

THE REPORT OF THE STANDING ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE

The Standing Advisory Committee on the Rules of Criminal Procedure has completed a review of Rule 7 and recommends revising it in a number of respects. There are two major revisions to the Rule. One eliminates the initial appearance as a step prior to the arraignment. In practice, almost all cases combine the two events and there is no longer any reason to keep the initial appearance. The other eliminates the procedure that allows defendants who have retained counsel to avoid appearing at their arraignment. Courts have a number of responsibilities requiring the defendant's appearance at arraignment whose importance outweighs the slight advantage in efficiency that serves as this practice's only justification.

The discussion below first describes the reasons for these, as well as the less significant, amendments the Committee has proposed. Then appears the text of Rule 7 as it exists now, how Rule 7 would appear if the amendments were all adopted, a markup of Rule 7 showing the revisions and deletions, and finally the proposed Reporter's Notes.

EXPLANATION OF PROPOSED AMENDMENTS

1. Requiring the Presence of the Defendant on a Date Certain

The current rule specifies when a defendant under arrest shall be brought to court. It does not address the same issue for defendants who receive a summons or have been arrested and bailed. The amended rule requires that such a defendant be ordered to appear on a date certain. Each court has its own procedure for conducting arraignments of defendants who are not in custody. Most require the attendance of the defendant the next day court is in session. Some specify a certain day of the week. The amendment is general enough to provide the flexibility needed to accommodate different local practices.

2. Substituting the words "the Court" for the Reference to Judges and Special Magistrates

In Suffolk and Middlesex Superior Court, a clerk-magistrate conducts the arraignments. In a number of places, Rule 7 refers to the person who presides over these proceedings as a judge or special magistrate. To remedy this omission, amendment substitutes the term "the Court." Rule 2(b)(5) states that this term "includes a judge, special magistrate, or clerk."

3. Eliminating Waiver of the Defendant's Initial Appearance

The option of allowing defendants who received a summons to absent themselves from the first court appearance has been a feature of the Rules since their inception. It is available only to defendants who received a summons and have retained their own lawyer, a distinct minority of those who appear in criminal cases. Of that minority, it is only a very small number of defendants who take advantage of this possibility.

The original justification for this feature was efficiency, avoiding unnecessary appearances. The Committee believes this advantage in a small number of cases is outweighed by the need to accomplish a number of important tasks that have been added to the job that courts must do when defendants first appear before them. Among them are:

- The need to establish the defendant's identity and criminal history, including any out of state record. If defendants do not appear in court, they cannot be interviewed by the probation department and someone with an outstanding warrant may remain at large with a new criminal case having been initiated against him or her.
- The need for the court to determine whether to impose appropriate conditions, such as an order to avoid contact with the alleged victim or alleged witnesses to a crime. The Legislature granted this authority to the courts in 2006, *see* St. 2006, c. 48, § 8, but the absence of the defendant at arraignment would prevent this.
- The need to commence probation violation proceedings in a timely way against a defendant as a result of the case before the court. *See, e.g.*, Dist. Ct. R. Probation Violation Proceedings 3(b)(i) & 3(c)(i).
- The statutory requirement mandated by G. L. c. 276, § 58 that all defendants be given a bail revocation warning.
- The need in certain cases to accommodate the right of a victim to request a no-contact order, mandated by G. L. c. 209A, § 6 (last paragraph).

It is also worth noting that some members of the Committee believe that this practice is seen as giving a special benefit to those defendants who are wealthy enough to retain counsel.

4. Eliminating the Initial Appearance

There is no reason to have an initial appearance as a separate event from an arraignment. It serves no purpose to keep the two separate and in practice they almost always take place on the same day. The only occasion when they do not under the current rule is when a defendant's presence is not required. However, another proposed amendment to Rule 7 eliminates that option.

Rule 7 was originally based on the model that the federal courts used. In federal court, a defendant can only be arraigned on an indictment or an information, and in cases where the defendant has been arrested prior to the initiation of criminal charges, it is not possible to have an arraignment without considerable delay. In Massachusetts, a defendant arrested for a charge within the jurisdiction of the District Court can be arraigned on the complaint that will serve as the charging document. Even in those cases where the defendant is arrested on a charge not within the jurisdiction of the District Court, the defendant can be arraigned on the complaint that will issue when the defendant is brought to court initially. So, in terms of legal doctrine there is no reason to separate out the initial appearance and the arraignment in Massachusetts.

There may have been a time when Massachusetts practice made it sensible to separate the initial appearance from the arraignment. When District Courts did not have attorneys in court every day available to represent indigent defendants, requiring a separate arraignment scheduled when an attorney could be present preserved the defendant's right to the assistance of counsel while still holding the police to the requirement of a prompt presentment. However, attorneys are now available in every District Court to represent defendants who appear for the first time.

5. Requiring Arraignments to be Conducted in Open Court

The existing rule specifies that the reading of the charges may be waived in open court but does not explicitly address where the arraignment shall take place. *Foley v. Commonwealth*, 429 Mass. 496, 498 (1999), mandates that the arraignment be conducted in open court and this amendment incorporates that requirement.

6. Referring to Required Warnings

Judges at arraignment must give defendants admitted to bail a warning about the possibility of bail revocation. G. L. c. 276, § 58. They must notify defendants charged with drug offenses of their right to request an examination concerning drug dependency. G.L. c. 111E, § 10. The Committee thought it prudent to add a general reference in Rule 7 to the need for judges to be aware of their general obligation to provide this information to defendants, as well as any others that may be added to their responsibilities.

7. Requiring Counsel to Provide Their Board of Bar Overseers Number

In Superior Court, attorneys must put their BBO number on an appearance, and some District Courts require this as well. It is also a requirement for briefs and other filings in the Supreme Judicial Court and the Appeals Court. The Committee believes it should be a uniform practice.

8. Clarifying the Procedure for the Arraignment of Corporations and Organizational Defendants

When a corporation or other organization is a defendant in a criminal case, a question may arise about the authority of the agent who appears at arraignment on behalf of the defendant. Rule 18(b) deals with the issue of who may appear on behalf of a corporation: "A corporation may appear by a duly authorized agent for the purposes of this rule." The Reporter's Notes state that, "[u]nder Mass.R.Crim.P 18, the corporation may appear for all purposes by 'duly authorized agent' which does not require counsel." This is a difference from federal practice, where corporations can only appear through counsel. *See Rowland v. California Men's Colony, Unit II Mens Advisory Council*, 506 U.S. 194, 201-02 (1993).

In the usual course of events, no one other than an attorney will appear on behalf of a corporation at arraignment. Defense counsel can certainly perform as an authorized agent of the corporation and enter a plea and make other decisions that the law gives to

defendants alone. Nothing in either Rule 7 or Rule 18, or any other provision of Massachusetts law, requires the agent to provide the court with proof of his or her authority to act. Some Massachusetts courts, however, do require the agent to provide such proof, typically in the form of evidence of an appropriate vote of the Board of Directors.

This issue is likely to have practical implications in the sort of cases likely to be found in the state courts, where closely held corporations with few shareholders probably are the typical organizational defendant. With such corporations, it may be the case that the lawyer engaged to appear at the arraignment has been retained by a single corporate officer without the authority of the full board and this situation creates the possibility for a conflict of interest.

SJC Rule 1:21 already requires corporate defendants in criminal cases to file at the initial appearance a disclosure form revealing the identity of any parent corporation or any publicly listed company that owns 10% or more of its shares. It would be a useful addition to Rule 7 to add a requirement that requires proof of authority to act.

EXISTING TEXT OF RULE 7

Rule 7. Initial Appearance and Arraignment

(a) Initial Appearance.

(1) Upon Arrest. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office. A defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session. At that time the defendant shall be interviewed by the probation department; the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant. The judge or special magistrate shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any.

(2) Upon Summons; Waiver of Initial Appearance. A summonsed defendant who has retained counsel shall be excused from appearing on the return day if such counsel enters an appearance for the defendant prior to the return day, stating thereon that he or she has conferred with the defendant and requests that the case be scheduled for pretrial hearing or other proceeding. Defendant's counsel shall inform the defendant of the date of the next scheduled event which shall require the defendant's presence.

(b) Appearance of Counsel.

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the initial appearance or, if the defendant was summonsed to appear, on or before the scheduled return day. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, address, and telephone number of the attorney.

(2) Effect; Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that if on the return day such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the return day wishes to withdraw the appearance, he or she may do so within fourteen days after the return day, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) Notice. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

(c) Arraignment. Arraignment shall consist of the reading of the charges to the defendant and the entry of the defendant's plea to those charges.

(1) Waiver of Reading of Charges. At arraignment the reading of the charges may be waived in open court by the defendant if he or she is represented by counsel.

(2) Entry of Not Guilty Plea. If a defendant is excused from appearing in court on the return day pursuant to this rule, a plea of not guilty shall be entered by the court on the defendant's behalf.

(d) Provision of Criminal Record; Preservation of Evidence. The court shall ensure that at or before arraignment, (1) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (2) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(e) Order Scheduling Pretrial Proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

PROPOSED AMENDMENT TO RULE 7

Rule 7. Arraignment

(a) Time of Arraignment; Probation Interview; Indigency and Bail Reports

(1) *Upon Arrest or Summons.* A defendant who has been arrested and is not released shall be brought for arraignment before a court if then in session, and if not, at its next session. A defendant who receives a summons or who has been arrested but is thereupon released shall be ordered to appear before the court for arraignment on a date certain.

(2) *Arrest of a Juvenile.* Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.

(3) *Probation Interview.* On the day of the arraignment, the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency.

(b) Arraignment Procedure.

(1) *Notice; Plea; and Bail.* The court shall:

(A) read the charges to the defendant in open court, except that the reading of the charges may be waived in open court by the defendant if he or she is represented by counsel;

(B) enter the defendant's plea to the charges;

(C) inform the defendant of all warnings and advisories required by law; and,

(D) determine the conditions of the defendant's release, if any.

(2) *Appointment of Counsel.* If the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.

(3) *Provision of Criminal Record; Preservation of Evidence.* The court shall ensure that at or before arraignment, (i) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (ii) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(4) *Order Scheduling Pretrial Proceedings.* At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

(c) Appearance of Counsel.

(1) *Filing.* An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the arraignment. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, Board of Bar Overseers number, address, and telephone number of the attorney. An attorney appearing on behalf of an organization shall also file with the court proof of the attorney's authorization to represent the organization.

(2) *Effect; Withdrawal.* An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that, if at the arraignment such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the arraignment wishes to withdraw the appearance, he or she may do so within fourteen days of the arraignment, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) *Notice.* A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

PROPOSED AMENDMENTS TO RULE 7 SHOWING REVISIONS AND DELETIONS

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface

~~Strikethrough~~ = removed from the rule

Bold = addition to the rule

Italics = moved to another part of the rule

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Rule 7. ~~Initial Appearance and Arraignment~~

(a) ~~Initial Appearance.~~ **Time of Arraignment; Probation Interview; Indigency and Bail Reports**

(1) Upon Arrest or **Summons**. ~~Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.~~ A defendant who has been arrested **and is not released** shall be brought **for arraignment** before a court if then in session, and if not, at its next session. **A defendant who receives a summons or who has been arrested but is thereupon released shall be ordered to appear before the court for arraignment on a date certain.** ~~At that time the defendant shall be interviewed by the probation department; the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant. The judge or special magistrate shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any.~~

(2) ~~Upon Summons, Waiver of Initial Appearance.~~ A summonsed defendant who has retained counsel shall be excused from appearing on the return day if such counsel enters an appearance for the defendant prior to the return day, stating thereon that he or she has conferred with the defendant and requests that the case be scheduled for pretrial hearing or other proceeding. Defendant's counsel shall inform the defendant of the date of the next scheduled event which shall require the defendant's presence.

(2) **Arrest of a Juvenile.** ~~Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.~~

(3) **Probation Interview.** **On the day of the arraignment,** the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency.

(b) ~~Appearance of Counsel.~~ **Arraignment Procedure.**

~~(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the initial appearance or, if the defendant was~~

~~summonsed to appear, on or before the scheduled return day. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, address, and telephone number of the attorney.~~

~~(2) Effect, Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that if on the return day such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the return day wishes to withdraw the appearance, he or she may do so within fourteen days after the return day, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal, thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.~~

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(1) Notice; Plea; and Bail. The court shall:

(A) read the charges to the defendant **in open court**, except that the reading of the charges may be waived in open court by the defendant if he or she is represented by counsel;

(B) enter the defendant's plea to the charges;

(C) inform the defendant of all warnings and advisories required by law; and,

(D) determine the conditions of the defendant's release, if any.

(2) Appointment of Counsel. If the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.

(3) Provision of Criminal Record; Preservation of Evidence. The court shall ensure that at or before arraignment, (i) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (ii) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(4) Order Scheduling Pretrial Proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

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~~(2) Entry of Not Guilty Plea. If a defendant is excused from appearing in court on the return day pursuant to this rule, a plea of not guilty shall be entered by the court on the defendant's behalf.~~

~~(c) Appearance of Counsel.~~

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the **arraignment**. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, **Board of Bar Overseers number**, address, and telephone number of the attorney. **An attorney appearing on behalf of an organization shall also file with the court proof of the attorney's authorization to represent the organization.**

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~~(e) Order Scheduling Pretrial Proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.~~

PROPOSED REPORTER'S NOTES

In 2010, Rule 7 was amended in several respects. These revisions are discussed below.

Subdivision (a)(1). Defendants who are released on bail prior to the issuance of a complaint or those who receive a summons must be ordered to appear in court for their arraignment on a date certain. Courts may establish their own policy on whether that date falls on the same day of every week or within a particular time frame. The 2010 amendments eliminated the separate event of an initial appearance prior to arraignment. The widespread availability of counsel to represent defendants at arraignment made this unnecessary. The 2010 amendments also eliminated the procedure that allowed a summonsed defendant who had retained counsel to be excused from appearing until the pretrial conference or trial.

Subdivision (b)(1). By referring to “the court” as the responsible agency for conducting all of the activities surrounding the arraignment, this subdivision incorporates by reference the definition of that term in Rule 2(b)(5), which includes not only judges but clerk-magistrates as well.

Subdivision (b)(1)(A). This provision requires that the arraignment take place in open court. It restates accepted practice, reflected in the mandate of *Foley v. Commonwealth*, 429 Mass. 496, 498 (1999). The concept of an open court means that the public must be allowed access absent “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Boston Herald v. Superior Court*, 421 Mass. 502, 505 (1995), quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984). Arraignments may take place outside of a courtroom, in settings such as correctional facilities, see *Foley, supra*, or hospitals, see *Boston Herald, supra*, so long as the public’s right of access to the proceedings is as free as in a courthouse, subject to the same considerations that might lead a judge to close a courtroom to the public.

Subdivision (b)(1)(C). This provision is intended to alert all the participants at the arraignment of the provisions for notice that appear outside the Rules of Criminal Procedure, such as the bail warning mandated by G. L. c. 276, § 58, and the requirement of G.L. c. 111E, § 10 that defendants charged with drug offenses have a right to request an examination concerning drug dependency.

Subdivision (c)(1). When an attorney in a criminal case appears for an organization, whether incorporated or not, he or she must present the court with proof of authority to act on behalf of the defendant. The proof of authority that this subdivision requires can come in the form of a resolution by a board of directors in the case of a corporate defendant or a similar statement from the person or group authorized to make litigation decisions on behalf of an unincorporated organization. SJC Rule 1:21 already requires corporate defendants in criminal cases to file a disclosure form revealing the identity of any parent corporation or any publicly listed company that owns 10% or more of its shares.